In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1727

FRESNO UNIFIED SCHOOL DISTRICT;
ARNOLD FINCH, SUPERINTENDENT;
JOHN TOOMAZIAN, KEITH CHUN,
ROBERT ARROYO, H. M. GINSBURG,
NANCY RICHARDSON, MEMBERS OF
THE BOARD OF EDUCATION OF THE FRESNO
UNIFIED SCHOOL DISTRICT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

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FRESNO UNIFIED SCHOOL DISTRICT;
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To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The Petitioners, Fresno Unified School District, Arnold Finch, former Superintendent, John Toomazian, Keith Chun, Robert Arroyo, H. M. Ginsburg, and Nancy Richardson, past and present members of the Board of Education of the Fresno Unified School District, pray that a writ of certiorari issue to review the Judgment of the United States

Court of Appeals for the Ninth Circuit filed March 12, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit filed March 12, 1979, is reported and printed in the appendix to this Petition. (Appendix A.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC § 1254. (Appendix B.)

QUESTIONS PRESENTED

I. Does the Opinion of the Ninth Circuit Court of Appeals Conflict with the Opinion of the Sixth Circuit Court of Appeals in the Case of *United States vs. Board of Education of Garfield Heights City School District, et al.*, 581 F2d 791 (August 7, 1978)?

II. Can the Reorganization Plan No. 1 of 1978 Be Applied Retroactively to Grant the Attorney General Retroactive Standing?

III. Did the Attorney General Lack the Authority to Bring a Pattern or Practice Lawsuit Against a School District Under Title VII Absent a Referral from the Equal Employment Opportunity Commission?

IV. Do the Procedures for Conciliation and An Opportunity to Resolve the Matter Without Contested Litigation of 42 USC§ 2000e-5(b) Apply to the Attorney General and Are They Required to Be Utilized Prior to Filing Suit Against a School District?

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of 42 USC§ 2000e-6. (Appendix C.) It also involves the terms of Reorganization Plan No. 1 of 1978, *reprinted in* [1978] U.S. Code Congressional and Administrative News 593. (Appendix D.)

STATEMENT OF THE CASE AND FACTS

On December 11, 1975, the Attorney General filed suit on behalf of the United States in the United States District Court for the Eastern District of California against the Fresno Unified School District, its Superintendent and its Board of Education. (Hereinafter "School District".) The United States alleged that the School District had pursued and was pursuing a pattern and practice of discrimination against women in appointment and promotion to administrative and supervisory positions with the School District and that the policies and practices of the School District constituted "a pattern or practice of resistance to the full enjoyment by women of the right to equal employment opportunity guaranteed them by Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, *et seq.*, and the Fourteenth Amendment to the Constitution of the United States." Jurisdiction was alleged under 28 USC § 1345 and 42 USC§ 2000e-6(b).

The School District filed a motion to dismiss on February 17, 1976, contending that the Attorney General of the United States had no authority under Section 707 of the Civil Rights Act of 1964 (42 USC § 2000e-6), as amended, to bring a pattern or practice suit absent a referral from the Equal Employment Opportunity Commission (EEOC) because the authority to initiate such an action was transferred to the EEOC by the 1972 amendments to the Act. The District Court granted the School District's motion and, on April 15, 1976, entered an Order of Dismissal. The District Court's opinion is reported as *U. S. v. Fresno Unified School District* 412 F.Supp. 392. (E.Dist.Calif. 1976) The United States filed a timely notice of appeal.

On February 23, 1978, the President submitted to Congress "Reorganization Plan No. 1 of 1978". (Appendix D.) Section 5 of the Plan transfers to the Attorney General full and complete authority in the "... initiation of litigation with respect to State or local government, or political subdivisions ..." under Section 707 of the Civil Rights Act, 42 USC§ 2000e-6. Congress made no objection and, by Executive Order 12068 of June 30, 1978, the Plan became effective July 1, 1978. (Appendix E.)

The case on appeal in the United States Court of Appeals for the Ninth Circuit was argued on December 5, 1978, and decided March 12, 1979. In a published opinion the court held that it would apply the law as it is now written. Because the Reorganization Plan now gives the Attorney General authority to independently initiate pattern or practice suits, the Court reversed the District Court's order of dismissal. The case was remanded for further consideration of other issues. On April 24, 1979, the School District filed a motion for stay of mandate pending application to this Court for a Writ of Certiorari. The motion was granted effective through April 25, 1979. On April 24, 1979, the School District filed a motion for further stay of mandate pending the filing of this Petition. The motion was denied on April 30, 1979.

REASONS FOR GRANTING THE WRIT

I. The Opinion of the Ninth Circuit Court of Appeals Is in Conflict With the Opinion of the Sixth Circuit Court of Appeals in the Case of United States v. Board of Education of Garfield Heights School District, Et Al, 581 F2d 791 (August 7, 1978).

In this case, the Ninth Circuit Court of Appeals held that, regardless of the Attorney General's standing to bring a pattern or practice lawsuit against the School District in

1975, the Reorganization Plan No. 1 of 1978 gave the Attorney General standing to bring such an action from and after July 1, 1978. The Ninth Circuit held that it was bound to apply the law in effect at the time of its decision, so it reversed the order of dismissal and remanded the case to the District Court. (Appendix A.) The Ninth Circuit candidly acknowledged that it disagreed with the decision of the Sixth Circuit Court of Appeals in a similar case:

> We are aware of *United States v. Board of Education, Garfield Heights,* 581 F2d 791 (6th Cir. 1978), decided after the effective date of the Reorganization Plan. The Court held that the Attorney General does not have independent authority to bring a pattern or practice suit against a public employer without a referral from the EEOC. Although the majority opinion did not mention the Reorganization Plan, reference to it in the dissent indicates that the court considered its impact on its decision.
>
> We disagree with the holding of the Sixth Circuit ...

In the Sixth Circuit case, *United States v. Board of Education of Garfield Heights School District,* 581 F2d 791 (6th Cir. 1978), the Court correctly held that the Attorney General's former independent pattern or practice authority under Title VII of the 1964 Civil Rights Act did not survive the 1972 amendments to the Act and that referral by the EEOC to the Attorney General was necessary to the institution of such suits. The dissent in the case makes it clear that the majority of the Court felt that the Reorganization Plan No. 1 of 1978 did not change the result in cases filed prior to the effective date of the plan.

An issue identical to that presented herein also is before this Court in *State of North Carolina, et al, vs. United States,* No. 78-1139, Petition for Writ of Mandate filed

January 18, 1979. As indicated in the *North Carolina* petition, this issue also has arisen in a number of other cases. It is important that this conflict between the Circuit Courts of Appeals be resolved so that a uniform rule will apply throughout the nation.

II. The Reorganization Plan No. 1 of 1978 Cannot Be Applied Retroactively to Grant the Attorney General Retroactive Standing.

In this case the Ninth Circuit Court of Appeals determined that the Reorganization Plan of 1978 should be given retroactive application which, in effect, granted the Attorney General retroactive standing. Aside from the fact that the Courts of Appeals are in conflict on this point, this decision is incorrect and inequitable inasmuch as the Congress expressly withdrew standing from the Attorney General between 1972 and 1978 by virtue of the 1972 amendments to the Civil Rights Act.

This argument is fully developed in the Petition for Writ of Certiorari filed on January 18, 1979, in the case of *State of North Carolina, et al, vs. United States,* No. 78-1139. The School District adopts and incorporates herein by reference the arguments advanced by the State of North Carolina at pages 17-21 of its Petition.

III. The Attorney General Lacked the Authority to Bring a Pattern or Practice Lawsuit Against a School District Under Title VII Absent a Referral from the Equal Employment Opportunity Commission.

Assuming that the Ninth Circuit Court of Appeals was incorrect in holding that the Reorganization Plan No. 1 of 1978 was of retroactive effect, the issue remains to be decided whether the Attorney General had the authority on December 11, 1975, to initiate this lawsuit absent a referral from the EEOC. This issue was the crux of the case before

the Reorganization Plan No. 1 of 1978 became effective and it will remain as the crucial issue if the School District is correct in asserting that the Attorney General cannot be granted retroactive standing by virtue of the Reorganization Plan. It is the position of the School District that as of March 24, 1974, the Attorney General lost the power to initiate a pattern or practice suit absent a referral from the EEOC due to the express language of 42 USC § 2000e-6(c).

This argument has been advanced and developed in the Petition for Writ of Certiorari on file in this Court in the case of *State of North Carolina vs. United States,* No. 78-1139, at pages 7-11. The School District adopts those arguments and incorporates them herein by reference.

IV. The Procedures for Conciliation and an Opportunity to Resolve the Matter Without Contested Litigation of 42 USC § 2000e-5(b) Apply to the Attorney General and Are Required to Be Utilized Prior to Filing Suit Against a School District.

Assuming arguendo that the Ninth Circuit was correct in holding that the Attorney General had authority to bring this lawsuit by virtue of retroactive application of the Reorganization Plan No. 1 of 1978, the Court nevertheless failed to expressly hold that the School District is still guaranteed the important and explicit procedural protections of 42 USC § 2000e-5 to which it was entitled prior to Reorganization Plan. Instead of deciding this important issue as it should have as a matter of law, the Court of Appeals directed the trial court to make factual findings regarding the protections to which the School District is entitled.

Prior to the effective date of the Reorganization Plan No. 1 of 1978, it was clear that all Civil Rights Act defend-

ants, including school districts, were entitled to the protections of 42 USC § 2000e-5 which included the following. An employer was to be given adequate notice by the EEOC of the making of a charge of employment discrimination. The employer was entitled to have the EEOC investigate the charge and attempt to conciliate the dispute without resort to contested litigation. Additionally, the EEOC was required to defer for sixty days to state or local authorities authorized to act under state or local law to remedy the practice in order to further facilitate non-judicial resolution of the case at the less formal local level. Only after these procedures were followed was the federal government authorized to file an action in the federal district court.

The Ninth Circuit Court of Appeals should have held but failed to hold that, notwithstanding the Reorganization Plan, the School District was and is still entitled to these explicit procedural protections. This Court should settle this important issue of law.

Substantially similar arguments have been advanced and developed in the Petition for Writ of Certiorari on file in this Court in the case of *State of North Carolina vs. United States*, No. 78-1139, at pages 12-16 and 21-25. The School District adopts those arguments and incorporates them herein by reference.

CONCLUSION

Clearly a conflict exists between the decisions of the Ninth Circuit Court of Appeals in this case and the Fourth Circuit Court of Appeals in the *North Carolina vs. United States* on the one hand, and the Sixth Circuit Court of Appeals in the *Garfield Heights* case on the other. The conflict concerns the granting of retroactive standing to sue to

the Attorney General. It is important that this conflict be resolved.

Additionally, it is necessary to determine what procedural rights are due the School District if the Reorganization Plan applies, and the standing of the Attorney General to sue if the Reorganization Plan does not apply.

These issues are of crucial importance to the petitioners in this case and in numerous other pattern or practice cases filed by the Attorney General against state and local government entities between 1974 and 1978. Accordingly, this Court should accept this case and rule on the questions presented.

Respectfully submitted,

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(Appendices follow)

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

Filed Mar 12, 1979

Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals

No. 76-2539

United States of America,
Plaintiff-Appellant,

v.

Fresno Unified School District; Arnold Finch, Superintendent; John Toomasian, Keith Chun, Robert Arroyo, H. M. Ginsburg, Nancy Richardson, Members of the Board of Education of the Fresno Unified School District,
Defendants-Appellees.

OPINION

On Appeal from the United States District Court
for the Eastern District of California

Before: WRIGHT and KILKENNY, Circuit Judges, and GRAY,* District Judge.

WRIGHT, Circuit Judge:

In December 1975 the United States, through the Attorney General, filed a complaint alleging a pattern and practice of discrimination against women by the Fresno Unified

*Of the Central District of California.

School District (School District) in its appointment and promotion procedures for administrative and supervisory positions. The district court dismissed the complaint under Fed. R. Civ. P. 12(b) for lack of jurisdiction and failure to state a claim, holding that the 1972 amendments to the Civil Rights Act of 1964 (Civil Rights Act) § 707, 42 U.S.C. § 2000e-6 (1976), transferred authority to initiate pattern or practice suits against public employers to the Equal Employment Opportunity Commission (EEOC).

The issue here is whether the Attorney General may initiate a pattern or practice suit without a referral from the EEOC. We conclude that he may, and reverse the district court and remand for further proceedings consistent with this opinion.

I.

BACKGROUND

Prior to the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972 amendments), the EEOC had investigatory and conciliatory functions under the Civil Rights Act, but could not bring suit in its own name. Civil actions based on individual complaints could be brought by the aggrieved party under § 706(e), 42 U.S.C. § 2000e-5(e) (1970), and suits alleging an intentional pattern or practice of employment discrimination could be filed by the Attorney General under § 707, 42 U.S.C. § 2000e-6 (1970). State and local governments and agencies were not covered by the Civil Rights Act.

The 1972 amendments enlarged the scope of the Civil Rights Act to include state and local government employers. 42 U.S.C. § 2000e(a) (1976). The EEOC also received expanded enforcement powers.

Section 706, 42 U.S.C. § 2000e-5 (1976), was amended to provide that, after exhaustion of various notice and conciliation procedures, the EEOC could itself bring civil actions against private employers. Only the Attorney General could bring such actions against a public employer. 42 U.S.C. § 2000e-5(f)(1) (1976).

Section 707, 42 U.S.C. § 2000e-6 (1976), was amended by the addition of three new subsections. Section 707(c) provided:

> Effective two years after March 24, 1972, the functions of the Attorney General under this section [dealing with pattern or practice suits] shall be transferred to the Commission . . . unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection.

Section 707(d) provided that, upon the transfer of functions in 1974, the EEOC was to be substituted for the United States or the Attorney General in all pattern or practice suits commenced prior to the transfer. Section 707(e) provided that, upon enactment of the amendments in 1972, the EEOC would "have authority to investigate and act on a charge of a pattern or practice of discrimination. . . . All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 [§ 706] of this title."

On February 23, 1978, the President submitted Reorganization Plan No. 1 of 1978 to Congress. The plan provides in relevant part:

> Section 5. *Transfer of public section 707 functions.* Any function of the Equal Employment Opportunity Commission concerning initiation of litigation with respect to State or local government, or political subdivisions under section 707 of title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-6) and all necessary functions related thereto, including

> investigations, findings, notice and an opportunity to resolve the matter without contested litigation, are hereby transferred to the Attorney General, to be exercised by him in accordance with procedures consistent with said title VII. The Attorney General is authorized to delegate any function under section 707 of said title VII to any officer or employee of the Department of Justice.

Reorganization Plan at 6-7, *reprinted in* [1978] U.S. Code Cong. & Ad. News 593, 598.

While resolutions disfavoring the plan were submitted in both houses, the House resolution was defeated and the Senate took no action before expiration of the 60-day period for disapproval specified in 5 U.S.C.A. § 906 (West 1977). This section of the Reorganization Plan became effective on July 1, 1978. Executive Order No. 12,068, 43 Fed. Reg. 28,971 (1978).

This action was begun after the transfer of functions to the EEOC but prior to the issuance of the Reorganization Plan. After the effective date of the transfer in 1974, there was a question regarding the respective powers of the EEOC and Attorney General to bring pattern and practice suits against public employers.[1] We believe, however, that

1. In their opening briefs, written prior to the issuance of the Plan, the parties offered three different interpretations of § 707.

The government's interpretation is generally consistent with the Reorganization Plan. It maintains that the functions transferred to the EEOC by § 707(c) were only those functions which the Attorney General had prior to the 1972 amendments: pattern and practice authority regarding *private* employers. It asserts that the Attorney General retained authority to initiate pattern or practice suits against *public* employers without prior referral by the EEOC.

The EEOC [sic] offers two alternative interpretations, which it continues to assert despite the Reorganization Plan. Because § 707(e) provides that all pattern or practice actions must be conducted in accordance with the procedural requirements of § 706, the EEOC should initiate such actions against public employers in order to attempt conciliation efforts.

the Reorganization Plan now makes clear that the Attorney General may bring a pattern or practice suit against such public employers as the School District.

II.

THE REORGANIZATION PLAN

A. *Authorization to Issue the Plan.*

The statute authorizing executive reorganizations provides:

> A reorganization plan may not provide for, and a reorganization under this chapter may not have the effect of . . . authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress. . . .

5 U.S.C.A. § 905(a)(4) (West 1977).

The School District contends that the Reorganization Plan is ineffective because the Civil Rights Act as amended in 1972 "did not *expressly* authorize the function that the reorganization plan purports to vest in the Attorney General. To the contrary, the law expressly disallows the Attorney General this function and vests it in the E.E.O.C."

The School District misconstrues the statute. The clear intent of 5 U.S.C.A. § 905(a)(4) (West 1977) is to prevent the creation by "reorganization" of a function not given by law to *any* agency. The statute specifically states that "[a]ny plan may provide for . . . the transfer of the whole or part of any agency, or of the whole or part of the functions thereof, to the jurisdiction and control of another

Only if these efforts fail should the EEOC refer the action to the Attorney General. The alternative interpretation is that the EEOC has had exclusive authority since the transfer of functions in 1974 to prosecute all pattern or practice cases, even against public employers.

Because we base our decision on the Reorganization Plan, we do not reach the merits of these conflicting interpretations of § 707.

agency. . . ." 5 U.S.C.A. § 903(a)(1) (West 1977). The Reorganization Plan did not create the power to bring pattern or practice suits, but merely transferred to the Attorney General any authority the EEOC may have assumed in 1974 to bring such suits against public employers.[2]

Even if we were to accept the School District's assertion that the 1972 amendments expressly withdrew from the Attorney General the authority to initiate pattern or practice suits, Congress stated that the transfer of functions to the EEOC would not be effective if "the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, . . . inconsistent with the provisions of this subsection." § 707(c), 42 U.S.C. § 2000e-6(c) (1976). Congress specifically allowed for the issuance of a reorganization plan, such as the one under consideration here, that might change the statutory authorization to bring public employer pattern or practice suits.

B. *Retroactive Application.*

Once we conclude that the Reorganization Plan was properly issued and became effective in July 1978, we must decide whether it can be applied here to litigation that began in 1975.

1. *Legislative History.*

The Attorney General maintains that the legislative history of the Reorganization Plan establishes that it is merely a reaffirmation of, not a change in, his right to initiate pattern and practice suits against public employers.

---

2. The Attorney General disputes that it ever lost its authority to the EEOC to initiate a public employer pattern or practice suit. The legislative history of the Reorganization Plan, discussed *infra*, supports this contention.

The Senate Committee Report on the plan stated that the 1972 amendments transferred authority to initiate pattern or practice suits to the EEOC

> except where the defendant is a State or Local Government. The Department of Justice was to retain jurisdiction to institute pattern or practice suits under title VII against State and Local Government employers subject to the Civil Rights Act.
>
> However, subsequently the courts held that this residuum to the Justice Department relating to pattern or practice suits is dependent upon referral by the EEOC after that agency completes the same procedures specified by the Civil Rights Act for processing charges of discrimination in the private sector.
>
> Section 5 of the Reorganization Plan transfers to the Justice Department full authority over the procedures leading to the filing of pattern or practice suits under title VII against State and local governments.

S. Rep. No. 750, 95th Cong., 2d Sess. 4 (1978).

The House Committee Report is similar:

> In 1972 Congress transferred this authority to bring pattern and practice suits to the Equal Employment Opportunity Commission. At the same time Congress gave to the Attorney General the authority to enforce equal employment practices against state and local government. Since then, however, some confusion has resulted in the courts and elsewhere regarding the Attorney General's right to file pattern and practice suits against such State and local governments.
>
> It is the purpose of Section 5 of the Reorganization Plan to restore the certainty of this authority in the hands of the Attorney General so that he can fully carry out the responsibility in such litigation as Congress intended.

H.R. Rep. No. 1069, 95th Cong., 2d Sess. 8 (1978).

The legislative history supports the government's argument that the courts have been mistaken in holding that

the Attorney General lost independent authority to initiate public sector pattern or practice suits. Although we are aware of the possible difficulties of interpreting the intent of an earlier Congress by reference to the legislative history of subsequent legislation, *see, e.g., International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 354 n.39 (1977), we think that the congressional reports on the Reorganization Plan are helpful in clarifying the confusing relationship of §§ 706 and 707 caused by the 1972 amendments.

2. *Applying the Law in Effect at the Time.*

Even if we do not accept the legislative history of the Reorganization Plan as conclusive that the Attorney General never lost his authority to bring a pattern or practice suit against a public employer without a referral from the EEOC, we are governed by the general principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board,* 416 U.S. 696, 711 (1974). *Accord Cort v. Ash,* 422 U.S. 66, 77 (1975); *Lee Pharmaceuticals v. Kreps,* 577 F.2d 610 (9th Cir. 1978), *cert. denied,* 47 U.S.L.W. 3456 (Jan. 9, 1979).

There is no clear "direction" in the Reorganization Plan proscribing its retroactive application. In fact, the legislative history indicates the opposite is true. Thus the School District must argue that retroactive application results in "manifest injustice."

The *Bradley* court stated that the considerations "relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. After applying this analysis framework to the fact situation here, we are unpersuaded that the School District will suffer a manifest injustice by allowing the Attorney General to bring a pattern or practice suit without referral from the EEOC.

In *Bradley,* the Supreme Court permitted a grant of attorney's fees to a group of parents who successfully challenged a school board's plan to desegregate, even though the statute authorizing such fees was not passed until the case was on appeal. The Court indicated that it is less likely to find manifest injustice in applying a new law to pending cases when the party adversely affected is a "publicly funded governmental entity" such as a school board and the other party is a class whose rights to education have been advanced by the litigation. *Id.* at 718. This is especially true when the new law deals with an issue of "great national concern." *Id.* at 719.

The School District attempts to distinguish *Bradley* by pointing out that the party harmed by the retroactive application of a new law there had legal and financial resources superior to the other party. In contrast, the party allegedly harmed here by the application of the Reorganization Plan, the School District, is "overwhelmed" by the power and resources of the United States.

Bradley does not set up a "resources test," allowing retroactive application of a new law only when the party adversely affected has legal and financial resources superior to the other party. Despite the apparent disparity in resources between the School District and the United States, the nature and identity of the parties here is much closer to those in *Bradley* than the School District would allow.

Although the School District is not being sued directly by a class whose interest would be advanced by the litigation, the Attorney General represents such a class. Like the law under discussion in *Bradley,* the Reorganization Plan deals with an issue of "great national concern." The plan specifies the agency which the President feels will be most effective in discouraging sex discrimination by pattern or practice suits.

The second concern listed in *Bradley* regarding the possibility of working an injustice deals with the nature of the rights affected. This concern is relevant only when application of the new law "would infringe upon or deprive a person of a right that had matured or become unconditional." 416 U.S. at 720. We find no such matured or unconditional right that would be affected by the application of the Reorganization Plan. As long as the School District receives notice of an intended suit and an opportunity to conciliate before the suit is filed, both of which are provided for in the plan, it cannot credibly argue that it has the right to be sued only after referral from the EEOC.[3]

The third concern listed in *Bradley* "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." 416 U.S. at 720. Application of the Reorganization Plan does not change the School District's obligation not to engage in a pattern or practice of discrimination under Civil Rights Act §§ 703, 704, 42 U.S.C. §§ 2000e-2,

3. *United States v. Alabama,* 362 U.S. 602 (1960) (per curiam), is a specific example of retroactive application of a law conferring the right to sue. The district court had dismissed a complaint against the state under the Civil Rights Act of 1957 on the grounds that the statute did not authorize an action by the United States against a state. The Supreme Court held that the case was controlled by a statute expressly authorizing such actions, even though the statute was not passed until after the district court's decision and the Fifth Circuit's affirmance.

2000e-3 (1976), nor does it impose additional burdens. It does specifically affirm the right to "notice [and] an opportunity to be heard." 416 U.S. at 720.

We conclude that the application of the Reorganization Plan, even if we assume that the application is retroactive, will not result in manifest injustice to the School District.

III.

OTHER CASES

We are aware of *United States v. Board of Education, Garfield Heights,* 581 F.2d 791 (6th Cir. 1978), decided after the effective date of the Reorganization Plan. The court held that the Attorney General does not have independent authority to bring a pattern or practice suit against a public employer without a referral from the EEOC. Although the majority opinion did not mention the Reorganization Plan, reference to it in the dissent indicates that the court considered its impact on its decision.

We disagree with the holding of the Sixth Circuit. The *Garfield* court relied in part on the three-judge district court opinion in *United States v. South Carolina,* 445 F. Supp. 1094 (D.S.C. 1977), and on its summary affirmance by the Supreme Court, 434 U.S. 1026 (1978). Neither the district court's decision nor the Supreme Court's affirmance is dispositive of the issue here.[4] Even if we assume the dis-

4. In *South Carolina,* the Attorney General and several private parties, allowed to sue as plaintiffs-intervenors, challenged the use of test scores in the certification of state teachers as violative of the 14th Amendment and Title VII of the Civil Rights Act. The district court dismissed the Attorney General's Title VII claim, concluding that he lacked the authority to bring such an action without a referral from the EEOC. The court reached the Title VII claim brought by the private plaintiffs-intervenors, however, and held for the defendants. On January 18, 1978, the Supreme Court affirmed summarily.

The *Garfield* court, while conceding that "the question is not entirely free from doubt," concluded that "the Supreme Court

trict court was correct in stating that the Attorney General lost the authority under the 1972 amendments to initiate a pattern or practice suit absent an EEOC referral, both its opinion and the Supreme Court's affirmance were issued prior to the effective date of the Reorganization Plan. We have already concluded that the plan may be applied retroactively in this fact situation.

A number of courts have held that the Reorganization Plan either reaffirms the Attorney General's authority to initiate public employer pattern or practice suits or else transfers to him that authority as of the plan's effective date. *United States v. North Carolina,* No. 77-1614 (4th Cir. Sept. 12, 1978); *United States v. New York,* No. 77-CV-343 (N.D.N.Y. Oct. 19, 1978); *United States v. City of San Francisco,* No. C-77-2884 RFP (N.D. Cal. Sept. 22, 1978); *United States v. Baltimore County,* No. H78-836 (D. Md. July 3, 1978).

IV.

PREREQUISITES TO THE FILING OF A PATTERN OR PRACTICE SUIT BY THE ATTORNEY GENERAL

The School District's final argument is that, even if the Reorganization Plan is applied, it is still necessary for the

necessarily affirmed the conclusion . . . that referral by the EEOC to the Attorney General is necessary prior to the institution of [pattern or practice] suits." 581 F.2d at 792. We disagree.

The Supreme Court has stated that, "'[w]hen we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached.'" *Mandel v. Bradley,* 432 U.S. 173, 176 (1977), *quoting Fusari v. Steinberg,* 419 U.S. 379, 391-92 (1975) (Burger C. J., concurring). The conclusion of the district court in *South Carolina* regarding the Attorney General's authority to initiate a pattern or practice suit was unnecessary to its holding on the merits and to the Supreme Court's affirmance. We decline, therefore, to read the summary affirmance as an interpretation of § 707 that precludes the Attorney General from bringing a pattern or practice suit without a referral from the EEOC.

Attorney General to comply with the procedures and administrative safeguards outlined in § 706; and, since he did not do so, the dismissal of the complaint should be upheld.

The Reorganization Plan transferred from the EEOC to the Attorney General all necessary functions related to the initiation of pattern or practice litigation "including investigations, findings, notice and an opportunity to resolve the matter without contested litigation . . . , to be exercised by him in accordance with the procedures consistent with said Title VII." Reorganization Plan § 5, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 598. This language reiterates many of the § 706 procedural prerequisites to litigation and follows from the requirement of § 707(e) that the EEOC was to conduct pattern or practice actions "in accordance with the procedures set forth" in § 706.

The apparent intent of the Reorganization Plan is to incorporate all § 706 requirements applicable to pattern or practice suits. Not all procedures listed in § 706, however, are necessarily relevant in pattern or practice litigation.[5] The parties did not address this issue below or on appeal, and its resolution is properly committed to the district court.

5. Some of the § 706 procedural requirements seem to apply only to individual unlawful employment practices and not to pattern or practice suits.

For example, § 706(e) requires the filing of a charge within 180 days of the alleged unlawful employment practice. Section 707, however, contains no requirement that anyone file a charge. A prima facie pattern or practice suit may be based solely on statistical evidence. *United States v. Ironworkers Local 86,* 443 F.2d 544, 551 (9th Cir. 1971). Further, it takes more than one unlawful practice to constitute a "pattern or practice" of employment discrimination. *See id.* at 552. Thus, there could be no certain date from which the 180-day period would run.

Other parts of § 706 that establish certain time limitations measured from the time a charge is filed have questionable application to pattern or practice litigation for the same reasons.

The district court also did not reach the question whether the Attorney General had met the necessary procedural requirements prior to filing suit. Thus, absent additional factual findings by the district court, we are unable to answer the ultimate question whether the Attorney General may bring this action against the School District.

IV.

CONCLUSION

In light of the Reorganization Plan, we hold that the Attorney General may initiate a pattern or practice suit against the School District without a referral from the EEOC if he has satisfied the procedural requirements of § 706 applicable to such suits. We remand to the district court for a determination of what § 706 requirements are applicable to pattern or practice litigation and whether the Attorney General has met those requirements.

Reversed and remanded. The parties will bear their own costs on this appeal.

Appendix B

APPENDIX B

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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Appendix 15

Appendix B

APPENDIX B

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

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Appendix C

42 U.S.C. § 2000e-5

§ 2000e-5. Prevention of unlawful employment practices

(a) Power of Commission. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS §§ 2000e-3].

(b) Charges; notification; investigation and determination. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of

subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law.

If any requirement for the commencement of such proceedings is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) Time for action under State or local law. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings

with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission Attorney General or person aggrieved. (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge of the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil

action under this section or the Attorney General has not filed a civil action in a case involving a governmental, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government,

governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e et seq.] Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committeed, in the juricial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judical district in which the respondent has his principal office. For purposes of section 1404 and 1406 of title 28 of the United States Code [28 USCS §§ 1404, 1406], the judicial district in which the respondent has his principal office shall in all cases be—considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the

case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from the date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual

was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

(h) Certain provisions inapplicable to actions against unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101-115) [29 USCS §§ 101 et seq.], shall not apply with respect to civil actions brought under this section.

(i) Proceedings to compel compliance with orders. In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code [28 USCS §§ 1291, 1292].

(k) Attorney's fee. In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(July 2, 1964, P. L. 88-352, Title VII, § 706, 78 Stat. 259; Mar. 24, 1972, P. L. 92-261, § 4, 86 Stat. 104.)

42 U.S.C. § 2000e-6

§ 2000e-6. Suits by Attorney General

(a) Complaint. Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title [42 USCS §§ 2000e et seq.], and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United State by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; hearing and determination. The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a

circuit judge and another of whom shall be a district judge of the court in which the proceedings was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions to Commission. Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither

House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code [5 USCS §§ 901 et seq.], inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions not to affect suits commenced prior to transfer. Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Authority of Commission to investigate and act on a charge of discrimination whether filed by or on behalf of aggrieved person or by member of Commission. Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act [42 USCS § 2000e-5].

(July 2, 1964, P.L. 88-352, Title VII, § 707, 78 Stat. 261; Mar. 24, 1972, P.L. 92-261, § 5, 86 Stat. 107.)

Appendix D

APPENDIX E

REORGANIZATION PLAN NO. 1 OF 1978

To the Congress of the United States:

I am submitting to you today reorganization Plan No. 1 of 1978. This Plan makes the Equal Employment Opportunity Commission the principal Federal Agency in fair employment enforcement. Together with actions I shall take by Executive Order, it consolidates Federal equal employment opportunity activities and lays, for the first time, the foundation of a unified, coherent Federal structure to combat job discrimination in all its forms.

In 1940 President Roosevelt issued the first Executive Order forbidding discrimination in employment by the Federal government. Since that time the Congress, the courts and the Executive Branch—spurred by the courage and sacrifice of many people and organizations—have taken historic steps to extend equal employment opportunity protection throughout the private as well as public sector. But each new prohibition against discrimination unfortunately has brought with it a further dispersal of Federal equal employment opportunity responsibility. This fragmentation of authority among a number of Federal agencies has meant confusion and ineffective enforcement for employees, regulatory duplication and needless expense for employers.

Fair employment is too vital for haphazard enforcement. My Administration will aggressively enforce our civil rights laws. Although discrimination in any area has severe consequences, limiting economic opportunity affects access to education, housing and health care. I, therefore, ask you to join with me to reorganize administration of the civil rights laws and to begin that effort by reorganizing the enforcement of those laws which ensure an equal opportunity to a job.

Eighteen government units now exercise important responsibilities under statutes, Executive Orders and regulations relating to equal employment opportunity:

The Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964, which bans employment discrimination based on race, national origin, sex or religion. The EEOC acts on individual complaints and also initiates private sector cases involving a "pattern or practice" of discrimination.

The Department of Labor and 11 other agencies enforce Executive Order 11246. This prohibits discrimination in employment on the basis of race, national origin, sex, or religion and requires affirmative action by government contractors. While the Department now coordinates enforcement of this "contract compliance" program, it is actually administered by eleven other departments and agencies. The Department also administers those statutes requiring contractors to take affirmative action to employ handicapped people, disabled veterans and Vietnam veterans.

In addition, the Labor Department enforces the Equal Pay Act of 1963, which prohibits employers from paying unequal wages based on sex, and the Age Discrimination in Employment Act of 1967, which forbids age discrimination against persons between the ages of 40 and 65.

The Department of Justice litigates Title VII cases involving public sector employers—State and local governments. The Department also represents the Federal government in lawsuits against Federal contractors and grant recipients who are in violation of Federal non-discrimination prohibitions.

The Civil Service Commission (CSC) enforces Title VII and all other nondiscrimination and alternative action requirements for Federal employment. The CSC rules on

complaints filed by individuals and monitors affirmative action plans submitted annually by other Federal agencies.

The Equal Employment Opportunity Coordinating Council includes representatives from EEOC, Labor, Justice, CSC and the Civil Rights Commission. It is charged with coordinating the Federal equal employment opportunity enforcement effort and with eliminating overlap and inconsistent standards.

In addition to these major government units, other agencies enforce various equal employment opportunity requirements which apply to specific grant programs. The Department of Treasury, for example, administers the anti-discrimination prohibitions applicable to recipients of revenue sharing funds.

These programs have had only limited success. Some of the past deficiencies include:

—inconsistent standards of compliance;

—duplicative, inconsistent paperwork requirements and investigative efforts;

—conflicts within agencies between their program responsibilities and their responsibility to enforce the civil rights laws;

—confusion on the part of workers about how and where to seek redress.

I am proposing today a series of steps to bring coherence to the equal employment enforcement effort. These steps, to be accomplished by the Reorganization Plan and Executive Orders, constitute an important step toward consolidation of equal employment opportunity enforcement. They will be implemented over the next two years, so that the agencies involved may continue their internal reform.

Its experience and broad scope make the EEOC suitable for the role of principal Federal agency in fair employment

enforcement. Located in the Executive Branch and responsible to the President, the EEOC has developed considerable expertise in the field of employment discrimination since Congress created it by the Civil Rights Act of 1964. The Commission has played a pioneer role in defining both employment discrimination and its appropriate remedies.

While it has had management problems in past administrations, the EEOC's new leadership is making substantial progress in correcting them. In the last seven months the Commission has redesigned its internal structures and adopted proven management techniques. Early experience with these procedures indicates a high degree of success in reducing and expediting new cases. At my direction, the Office of Management and Budget is actively assisting the EEOC to ensure that these reforms continue.

The Reorganization Plan I am submitting will accomplish the following:

On July 1, 1978, abolish the Equal Employment Opportunity Coordinating Council (42 U.S.C. 2000e-14) and transfer its duties to the EEOC (no positions or funds shifted).

On July 1, 1979, shift responsibility for enforcing both the Equal Pay Act and the Age Discrimination in Employment Act from the Labor Department to the EEOC (198 positions and $3.5 million for Age Discrimination).

"Clarify the Attorney General's authority to initiate "pattern or practice" suits under Title VII in the public sector.

In addition, I will issue an Executive Order on October 1, 1978, to consolidate the contract compliance program—now the responsibility of Labor and eleven "compliance agencies"—into the Labor Department (1,517 positions and $33.1 million shifted).

These proposed transfers and consolidations reduce from fifteen to three the number of Federal agencies having important equal employment opportunity responsibilities under Title VII of the Civil Rights Act of 1964 and Federal contract compliance provisions.

Each element of my Plan is important to the success of the entire proposal.

By abolishing the Equal Employment Opportunity Coordinating Council and transferring its responsibilities to the EEOC, this plan places the Commission at the center of equal employment opportunity enforcement. With these new responsibilities, the EEOC can give coherence and direction to the government's efforts by developing strong uniform enforcement standards to apply throughout the government: standardized data collection procedures, joint training programs, programs to ensure the sharing of enforcement related data among agencies, and methods and priorities for complaint and compliance reviews. Such direction has been absent in the Equal Employment Opportunity Coordinating Council.

It should be stressed, however, that affected agencies will be consulted before EEOC takes any action. When the Plan has been approved, I intend to issue an Executive Order which will provide for consultation, as well as a procedure for reviewing major disputed issues within the Executive Office of the President. The Attorney General's responsibility to advise the Executive Branch on legal issues will also be preserved.

Transfer of the Civil Service Commission's equal employment opportunity responsibilities to EEOC is needed to ensure that: (1) Federal employees have the same rights and remedies as those in the private sector and in State and local government; (2) Federal agencies meet the same standards as are required of other employers; and (3) potential conflicts between an agency's equal employment opportunity and personnel management functions are minimized. The

Federal government must not fall below the standard of performance it expects of private employers.

The Civil Service Commission has in the past been lethargic in enforcing fair employment requirements within the Federal government. While the Chairman and other Commissioners I have appointed have already demonstrated their personal commitment to expanding equal employment opportunity, responsibility for ensuring fair employment for Federal employees should rest ultimately with the EEOC.

We must ensure that the transfer in no way undermines the important objectives of the comprehensive civil service reorganization which will be submitted to Congress in the near future. When the two plans take effect, I will direct the EEOC and the CSC to coordinate their procedures to prevent any duplication and overlap.

The Equal Pay Act now administered by the Labor Department, prohibits employers from paying unequal wages based on sex. Title VII of the Civil Rights Act, which is enforced by EEOC, contains a broader ban on sex discrimination. The transfer of Equal Pay responsibility from the Labor Department to the EEOC will minimize overlap and centralize enforcement of statutory prohibitions against sex discrimination in employment.

The transfer will strengthen efforts to combat sex discrimination. Such efforts would be enhanced still further by passage of the legislation pending before you, which I support, that would prohibit employers from excluding women disabled by pregnancy from participating in disability programs.

There is now virtually complete overlap in the employers, labor organizations, and employment agencies covered by Title VII and by the Age Discrimination in Employment Act. This overlap is burdensome to employers and confusing to victims of discrimination. The proposed transfer of the age discrimination program from the Labor Department to the EEOC will eliminate the duplication.

The plan I am proposing will not affect the Attorney General's responsibility to enforce Title VII against State or local governments or to represent the Federal government in suits against Federal contractors and grant recipients. In 1972, the Congress determined that the Attorney General should be involved in suits against State and local governments. This proposal reinforces that judgment and clarifies the Attorney General's authority to initiate litigation against State or local governments engaged in a "pattern or practice" cases.

A critical element of my proposals will be accomplished by Executive Order rather than by the Reorganization Plan. This involves consolidation in the Labor Department of the responsibility to ensure that Federal contractors comply with Executive Order 11246. Consolidation will achieve the following: promote consistent standards, procedures, and reporting requirements; remove contractors from the jurisdiction of multiple agencies; prevent an agency's equal employment objectives from being outweighed by its procurement and construction objectives; and produce more effective law enforcement through unification of planning, training and sanctions. By 1981, after I have had an opportunity to review the manner in which both the EEOC and the Labor Department are exercising their new responsibilities, I will determine whether further action is appropriate.

Finally, the responsibility for enforcing grant-related equal employment provisions will remain with the agencies administering the grant programs. With the EEOC acting as coordinator of Federal equal employment programs, we will be able to bring overlap and duplication to a minimum.

We will be able, for example, to see that a university's employment practices are not subject to duplicative investigations under both Title IX of the Education Amendments of 1972 and the contract compliance program. Because of the similarities between the Executive Order program and those statutes requiring Federal contractors to take affirmative action to employ handicapped individuals and disabled and Vietnam veterans, I have determined that enforcement of these statutes should remain in the Labor Department.

Each of the changes set forth in the Reorganization Plan accompanying this message is necessary to accomplish one or more of the purposes set forth in Section 901(a) of Title 5 of the United States Code. I have taken care to determine that all functions abolished the Plan are done only under the statutory authority provided by Section 903(b) of Title 5 of the United States Code.

I do not anticipate that the reorganizations contained in this Plan will result in any significant change in expenditures. They will result in a more efficient and manageable enforcement program.

The Plan I am submitting is moderate and measured. It gives the Equal Employment Opportunity Commission—an agency dedicated solely to this purpose—the primary Federal responsibility in the area of job discrimination, but it is designed to give this agency sufficient time to absorb its new responsibilities. This reorganization will produce consistent agency standards, as well as increased accountability. Combined with the intense commitment of those charged with these responsibilities, it will become possible for us to accelerate this nation's progress in ensuring equal job opportunities for all our people.

JIMMY CARTER:

The White House, *February 23, 1978*

Reorganization Plan No. 1 of 1978

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, February 23, 1978, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

EQUAL EMPLOYMENT OPPORTUNITY

Section 1. *Transfer of equal pay enforcement functions.*

All functions related to enforcing or administering section 6(d) of the Fair Labor Standards Act, as amended, (29 U.S.C. 206(d) are hereby transferred to the Equal Employment Opportunity Commission. Such functions include, but shall not be limited to, the functions relating to equal pay administration and enforcement now vested in the Secretary of Labor, the Administrator of the Wage and Hour Division of the Department of Labor and the Civil Service Commission pursuant to sections 4(d)(1);4(f);9;11 (a), (b), and (c); 16 (b) and (c) and 17 of the Fair Labor Standards Act, as amended (29 U.S.C. 204(d)(1); 204(f); 209; 211 (a), (b), and (c); 216 (b) and (c) and 217) and section 10(b)(1) of the Portal-to-Portal Act of 1947, as amended, (29 U.S.C. 259).

Section 2. *Transfer of age discrimination enforcement functions.*

All functions vested in the Secretary of Labor or in the Civil Service Commission pursuant to sections 2, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621, 623, 626, 627, 628, 629, 630, 631, 632, 633, and 633a) are hereby transferred to the Equal Employment Opportunity Commission. All functions related to age discrimination administration and enforcement pursuant to sections 6 and 16 of the Age Discrimination in Employment Act of 1967, as amended (29

U.S.C. 625 and 634) are hereby transferred to the Equal Employment Opportunity Commission.

Section 3. *Transfer of equal opportunity in Federal employment enforcement functions.*

(a) All equal opportunity in Federal employment enforcement and related functions vested in the Civil Service Commission pursuant to section 717(b) and (c) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e—16 (b) and (c)), are hereby transferred to the Equal Employment Opportunity Commission.

(b) The Equal Employment Opportunity Commission may delegate to the Civil Service Commission or its successor the function of making a preliminary determination on the issue of discrimination whenever, as a part of a complaint or appeal before the Civil Service Commission on other grounds, a Federal employee alleges a violation of section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e—16) provided that the Equal Employment Opportunity Commission retains the function of making the final determination concerning such issue of discrimination.

Section 4. *Transfer of Federal employment of handicapped individuals enforcement functions.*

All Federal employment of handicapped individuals enforcement functions and related functions vested in the Civil Service Commission pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) are hereby transfered to the Equal Employment Opportunity Commission. The function of being cochairman of the Interagency Commitee on Handicapped Employees now vested in the Chairman of the Civil Service Commission pursuant to section 501 is hereby transferred to the Chairman of the Equal Employment Opportunity Commission.

Section 5. *Transfer of public sector 707 functions.*

Any function of the Equal Employment Opportunity Commission concerning initiation of litigation with respect to State or local government or political subdivision under section 707 of title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e—6) and all necessary functions related thereto, including investigations, findings, notice and an opportunity to resolve the matter without contested litigation, are hereby transferred to the Attorney General, to be exercised by him in accordance with procedures consistent with said title VII. The Attorney General is authorized to delegate any function under section 707 of said title VII to any officer or employee of the Department of Justice.

Section 6. *Transfer of functions and abolition of the Equal Employment Opportunity Coordinating Council.*

All functions of the Equal Employment Opportunity Coordinating Council, which was established pursuant to section 715 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e—14), are hereby transferred to the Equal Employment Opportunity Commission. The Equal Employment Opportunity Coordinating Council is hereby abolished.

Section 7. *Savings provision.*

Administrative proceedings including administrative appeals from the acts of an executive agency (as defined by section 105 of title 5 of the United States Code) commenced or being conducted by or against such executive agency will not abate by reason of the taking effect of this plan. Consistent with the provisions of this plan, all such proceedings shall continue before the Equal Employment Opportunity Commission otherwise unaffected by the transfers provided by this plan. Consistent with the provision of this plan, the Equal Employment Opportunity Commission shall accept appeals from those executive agency actions

which occurred prior to the effective date of this plan in accordance with law and regulations in effect on such effective date. Nothing herein shall affect any right of any person to judicial review under applicable law.

Section 8. *Incidental transfers.*

So much of the personnel, property, records and unexpended balances of appropriations, allocations and other funds employed, used, held, available, or to be made available in connection with the functions transferred under this plan, as the Director of the Office of Management and Budget shall determine, shall be transferred to the appropriate department, agency, or component at such time or times as the Director of the Office of Management and Budget shall provide, except that no such unexpended balances transferred shall be used for purposes other than those for which the appropriation was originally made. The Director of the Office of Management and Budget shall provide for terminating the affairs of the Council abolished herein and for such further measures and dispositions as such Director deems necessary to effectuate the purposes of this reorganization plan.

Section 9. *Effective date.*

This reorganization plan shall become effective at such time or times, on or before October 1, 1979, as the President shall specify, but not sooner than the earliest time allowable under section 906 of title 5 of the United States Code.

Appendix E

[EXECUTIVE ORDER No. 12068]

PROVIDING FOR TRANSFER TO THE ATTORNEY GENERAL OF CERTAIN FUNCTIONS UNDER SECTION 707 OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

By virtue of the authority vested in me as President of the United States by the Constitution and laws of the United States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 F.R. 19807), in order to clarify the Attorney General's authority to initiate public sector litigation under Section 707 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-6), it is ordered as follows:

1—1 SECTION 707 FUNCTIONS OF THE ATTORNEY GENERAL

1—101. Section 5 of Reorganization Plan Number 1 of 1978 (43 F.R. 19807) shall become effective on July 1, 1978.

1—102. The functions transferred to the Attorney General by Section 5 of Reorganization Plan Number 1 of 1978 shall, consistent with Section 707 of Title VII of the Civil Rights Act of 1964, as amended, be performed in accordance with Department of Justice procedures heretofore followed under Section 707.

/s/ Jimmy Carter

THE WHITE HOUSE
June 30, 1978.

No. 78-1727

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRESNO UNIFIED SCHOOL DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of a judgment reversing the district court's dismissal of the United States' complaint. The district court held (412 F. Supp. 392) that after March 24, 1974, the Attorney General lacked authority to sue a public employer, alleging a "pattern or practice" of discrimination on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, without a referral from the Equal Employment Opportunity Commission. Before the case was argued on appeal the President submitted to Congress Reorganization Plan No. 1 of 1978 (Pet. App. 27-38), Section 5 of which reaffirmed the Attorney General's authority to bring Title VII "pattern or practice" suits against public employers and delegated to the Attorney General all of the EEOC's pre-suit functions with respect to state and local

governments (*id.* at 37). Accordingly, the court of appeals, applying the law "as it is now written" (*Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 711 (1974)), reversed and remanded (Pet. App. 14) "for a determination of what [pre-suit] requirements are applicable to pattern or practice litigation and whether the Attorney General has met those requirements."*

As petitioners acknowledge (Pet. 4), the issues they raise are identical to those in *North Carolina* v. *United States*, No. 78-1139. Petitioners here incorporate by reference (Pet. 4-6) the arguments made by the petitioners in that case. This Court denied certiorari in No. 78-1139 on May 29, 1979. There is no reason why the issues raised here call for review in light of the denial of review in No. 78-1139. (We have furnished petitioners with a copy of our brief in opposition in that case.)

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

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*The court of appeals' opinion is reported at 592 F. 2d 1088.